IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CHARLES A. TEMPLE and JAMES WHEELER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 3:00-0126
	)	Judge Trauger
STATE OF TENNESSEE, THE AMERICAN TOBACCO COMPANY, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, PHILIP MORRIS C.T., LIGGETT & MYERS TOBACCO COMPANY, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM and ORDER

A hearing was held on March 25, 2002 on the plaintiffs' Motion for a Preliminary Injunction (Docket No. 126), to which the defendants have responded (Docket Nos. 159, 168, 170) and the plaintiffs have replied (Docket No. 186). For the reasons stated herein, the plaintiffs' motion will be denied.

The plaintiffs have brought federal claims under 42 U.S.C. §§ 1983, 1985, and 1986 and Tennessee state law claims for unjust enrichment, conspiracy to convert funds belonging to the plaintiffs, and breach of contract. (Docket No. 147, Third Amended Complaint at 40-44) These claims arise out of the Master Settlement Agreement entered into in December 1998 by the State of Tennessee and various tobacco companies, some of which are named as defendants in this case. (Docket No. 164, attach. Ex. A, Master Settlement Agreement)

The Master Settlement Agreement served to resolve all claims brought by the State of Tennessee against various tobacco companies in a Complaint filed in the Davidson County,

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Tennessee Chancery Court on December 21, 1998. (Docket No. 167, attach. Ex. A, State Complaint) In this suit, the State brought claims, "at the request of the Division of Consumer Affairs of the Tennessee Department of Commerce and Insurance," for unfair and deceptive trade practices and for deceptive practices in targeting to youth under the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101, *et seq*. and 39-17-1501, *et seq*., for restraint of trade in violation of Tenn. Code Ann. § 47-25-101, *et seq*., and for unjust enrichment. *Id.* The claim for unjust enrichment was based on the allegation that the tobacco companies "have caused damage to the [State] by wrongfully imposing medical expenses paid for by the [State], for tobacco-related diseases that [the tobacco companies], in equity, should pay because this harm was caused by [their] products." *Id.* at 18-19.

The plaintiffs have claimed repeatedly in this case that they are not challenging the validity of the Master Settlement Agreement. Instead, the plaintiffs claim that the defendants' actions in entering into the Master Settlement Agreement have violated their civil rights. The plaintiffs seek a preliminary injunction barring the tobacco companies from paying any more money to the State and the State from receiving any more money from the tobacco companies under the Master Settlement Agreement. (Docket No. 126) The plaintiffs request that the court direct the tobacco companies to pay this money into a court-supervised account pending resolution of this case on its merits. This motion is brought on the basis of the plaintiffs' federal claims against the State under Sections 1983, 1985, and 1986. *Id.* at 4.

In considering a motion for a preliminary injunction, the court must weigh four factors: (1) the plaintiffs' likelihood of success on the merits; (2) the likelihood of irreparable injury to the plaintiffs absent the injunction; (3) the potential of an injunction to cause substantial harm to others; and (4) the degree to which the injunction would serve the public interest. *See*

Wonderland Shopping Center Venture Ltd. Partnership v. CDC Mortgage Capital, Inc., 274 F.3d 1085, 1097 (6th Cir. 2001). These factors are not prerequisites, and no single factor is determinative. *See Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001). The purpose of issuing a preliminary injunction is to "'preserve the relative positions of the parties until a trial on the merits can be held.'" *Id.* (quoting *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 400 (6th Cir. 1997)).

The plaintiffs' claims are based on the Tennessee common law make-whole doctrine.[1] According to the plaintiffs' theory, most, if not all, of the money received by the State under the Master Settlement Agreement is intended to reimburse the State for smoking-related medical expenses paid by the State on behalf of individuals like the plaintiffs, recipients of TennCare, the State's medicaid program.[2] They claim that, under this doctrine, the State (as the insurer) does not have the right to seek direct reimbursement for medical expenses incurred as a result of wrongs committed by third-party tortfeasors (the tobacco companies) against the insureds unless and until the insureds are "made whole" for their injuries.[3] This amounts to a claim that the State

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[1]Although the plaintiffs address the make-whole doctrine under both federal and state common law, they rely on the doctrine as it has been established under Tennessee law. *See* Docket No. 147, Third Amended Complaint at 18-19, 22-23; Docket No. 127 at 8-11; Docket No. 166 at 8.

[2]The State vigorously denies that the settlement money is entirely or even principally for medical expense reimbursement. The Master Settlement Agreement does not specify what portion, if any, of the settlement amount is allocated to each of the State's claims.

[3]The TennCare subrogation statute was amended effective May 24, 2000. Tenn. Code Ann. § 71-5-117. Subsections (g) through (j) were added to "be used in lieu of application of the 'made whole' doctrine for any recovery authorized under this section." Tenn. Code Ann. § 71-5-117(k). As the plaintiffs argue, these subsections do not allow for direct recovery by the State against tortfeasors for medical expenses paid on behalf of TennCare recipients. Instead, plaintiffs who bring individual actions are required to contact the State to determine whether the State has a subrogation interest in any recovery. The trial court is then required to incorporate

has no right to these monies unless and until individuals like the plaintiffs (TennCare insureds) receive from the tobacco companies compensation for pain and suffering, loss of enjoyment of life, and other damages caused by their smoking-related injuries. Because the State is receiving such money under the Master Settlement Agreement, the plaintiffs allege both the deprivation of property without due process of law under the Fourteenth Amendment and a taking without just compensation under the Fifth Amendment to the United States Constitution.

For the issuance of an injunction, the plaintiffs must prove that they are likely to succeed on the merits of their federal claims. The plaintiffs must first identify the "property" they claim is being taken from them without due process or just compensation. *See Hamilton v. Myers*, 281 F.3d 520, 529 (6th Cir. 2002) (due process); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894, 898-99 (6th Cir. 1990) (just compensation). In their briefs, the plaintiffs identify the "property" as the cause of action for the recovery of medical expenses. (Docket No. 127 at 14; Docket No. 186 at 3)[4] Assuming that the plaintiffs have incurred medical expenses for smoking-related illnesses and that they have a protectable property interest in a cause of action for their reimbursement, the court must determine whether they have been deprived of this property by the State.[5] They have not.

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any subrogation interest into the final judgment. Whether and, if so, how this amendment affects the plaintiffs' claims is one question before the court. Because the resolution of this issue is not necessary at this time, the court will presume that the common law make-whole doctrine applies since the State and the tobacco companies entered into the Master Settlement Agreement prior to the effective date of this amendment.

[4]At oral argument, the plaintiffs identified the "property" as the reimbursement for medical expenses.

[5]The plaintiff has brought these claims against the tobacco companies as well as the State defendants, alleging that the tobacco companies acted under color of state law. (Docket No. 147, Third Amended Complaint at 40) For purposes of this decision only, the court will presume that

Under basic principles of contract law, the State and the tobacco companies could not contract to extinguish the plaintiffs' legal rights. And, as the plaintiffs have conceded and the Tennessee Supreme Court has ruled, they are not precluded by the Master Settlement Agreement from bringing individual personal injury claims against the tobacco companies or from seeking reimbursement for medical expenses as one element of their damages in such suits. *See State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 192 (Tenn. 2000) (finding that "[t]he M[aster] S[ettlement] A[greement] . . . does not prohibit suits seeking 'private or individual relief for separate and distinct injuries'").

The thrust of the plaintiffs' argument is that the State did not have the legal right to be reimbursed for medical expenses prior to their being "made whole" for their injuries. The plaintiffs claim that, by receiving money under the Master Settlement Agreement to reimburse it for medical expenses, the State "commandeered" their right to recover that money from the tobacco defendants as damages for their injuries. (Docket No. 186 at 3) But this money is being paid pursuant to an agreement the validity of which the plaintiffs claim they are not challenging. As long as the money is being paid under the terms of that agreement, the plaintiffs cannot "commandeer" it from the State without either attacking that agreement or seeking the money as damages from the State, which is precluded by the Eleventh Amendment to the United States Constitution.

As a separate argument, the plaintiffs claim that their recoverable damages may be affected by the tobacco companies' ability to set off the medical expenses paid to the State under the Master Settlement Agreement. The plaintiffs claim that the Master Settlement Agreement

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the tobacco companies were state actors with regard to entering into the Master Settlement Agreement.

allows the tobacco companies to reduce the amount owed to the State by any amount of medical expenses paid as a result of separate, individual lawsuits, an interpretation that the defendants have not contested. But the plaintiffs have failed to establish that the set-off provision would have any effect on their ability to recover medical expenses in personal injury suits against the tobacco companies.

In sum, the plaintiffs have offered no evidence to show that, in entering into the Master Settlement Agreement, the State and the tobacco companies deprived the plaintiffs of any property interests. Because the plaintiffs have not shown any deprivation or taking of property by the State, the court cannot find a likelihood of success on the merits of their federal claims. For similar reasons, the court finds that the plaintiffs have not established a likelihood of irreparable injury absent an injunction. Whether or not the plaintiffs will be able to recover medical expenses in personal injury claims against the tobacco companies is not affected by the State's receipt of payments under the Master Settlement Agreement.

The plaintiffs argue that they still may suffer irreparable injury because the tobacco companies may become insolvent before the plaintiffs can prosecute their claims and collect any judgments awarded. They maintain that the payments to the State that they seek to divert into a court-supervised account may be the only source of recovery on their claims. But the plaintiffs have offered no evidence to support this proposition, and they may not rely on speculation to establish it.

The final two factors, as well, weigh against the issuance of a preliminary injunction. The plaintiffs argue that no one will be harmed by the injunction, but that is far from the case. The April 15 payment, estimated at over $100 million, has already been appropriated by the state legislature, and the diversion of those funds would "precipitate an unprecedented fiscal emergency in the State of Tennessee." (Docket No. 171, Affidavit of C. Warren Neel, para. 6) C. Warren Neal, the Commissioner of the Tennessee Department of Finance and Administration, has stated in a sworn statement to this court that, "the budget shortfall would increase to over $150 million and the State's bond rating would be materially affected. The State's ability to satisfactorily comply with Court orders, contracts and federal legislative mandates would possibly be jeopardized." *Id.*

There can be no doubt that the public would be harmed by the issuance of this injunction. For the same reasons, the public interest must weigh in favor of allowing the State to receive and to utilize those funds in a year when Tennessee is already facing a "projected budget shortfall of approximately $350 million." *Id.*, para. 5.

The plaintiffs have failed to meet their burden for the issuance of a preliminary injunction in this case. The plaintiffs have not established a likelihood of success on the merits or that they would be harmed irreparably by the denial of an injunction. The State and the public, however, would be harmed if the State is denied the use of the funds.

For the reasons stated herein, the plaintiffs' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) (Docket No. 126) is **DENIED**.

It is so Ordered.

Enter this 27th day of March, 2002.

ALETA A. TRAUGER
United States District Judge